Nos. 744 and 745

IN THE

Supreme Court of the United States

October Term, 1951

CHARLES SAWYER, SECRETARY OF COMMERCE,
Petitioner,

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, ET AL.

BRIEF FOR THE UNITED STEELWORKERS OF AMERICA, CIO AS *AMICUS CURIAE*

CONSENT TO FILE

This brief *amicus curiae* is filed pursuant to Rule 27 of the Court's rules. The consent of all parties in both No. 744 and No. 745 has been obtained.

INTRODUCTION

The United Steelworkers of America, CIO (hereinafter called the Union), as the representative of the employees of the plaintiff steel companies, has a vital interest in this proceeding. The Union, however, does not intend in this brief to urge upon the Court any particular resolution of the equitable and constitutional arguments presented by the parties. In accordance with the spirit of Rule 27, the Union will limit its brief to the consideration of issues as to which the Union believes it can provide material which will be of assistance to

the Court in disposing of the ultimate questions here involved.

The questions as to which we believe we are in a position to aid the Court in its disposition of this case are these:

(1) The availability of an 80-day "cooling off" injunction under the Taft-Hartley Act, as an alternative to Presidential seizure;

(2) The nature of the dispute giving rise to the emergency of April 8, 1952;

(3) The status of the parties to the steel dispute pending disposition of this case.

These issues have all been raised by the parties to the litigation in the course of arguing the basic constitutional question here involved. As to each of them the Union has a special interest and, we believe, a special viewpoint.

ARGUMENT

I

The powers of the President, whatever they may have been, to seize the steel industry on April 8, 1952, were not limited or diminished by the fact that he did not then invoke the injunctive procedures of the Taft-Hartley Act.

In the argument of this case below special emphasis was placed by the plaintiffs upon the alleged availability of a Taft-Hartley injunction on April 8, 1952, as an alternative method of preventing a stoppage of work in the steel industry and thus avoiding the peril to the national defense involved in the cessation of the production of steel. The argument of the plaintiff companies seemed to have two branches. The first branch of the argument was that Congress had provided a method in the Taft-Hartley Act for handling emergencies of the nature of the one here involved and that this method, once provided, constituted an implied limitation upon the power of the President to use alternative methods for dealing with the situation. The second branch of the argument seemed to be that the existence of the Taft-Hartley remedy meant that there was no emergency which would give rise to the exercise of Presidential authority under the Constitution, since such power can be used only where there are no other

methods of dealing with the emergency. This branch of the argument amounts to saying, in effect, that an emergency did not *really* exist on April 8, 1952. The emergency which caused the President to act, it was argued by the companies, was created by his own failure to use procedures of the Taft-Hartley Act.

Both branches of this argument are incorrect on their faces. The Taft-Hartley remedy is not mandatory. It is not exclusive. And, even if available, it would have been ineffectual to prevent an immediate stoppage of steel production at midnight April 8, 1952. We assume, however, that the Solicitor General, in his argument, will fully deal with these points. Our purpose in this brief is to demonstrate that both branches of the argument rest on a false premise.

The hidden premise on which the companies' argument basically rests is that the decision to use or not to use the Taft-Hartley procedures had to be made, for the first time, with reference to the impending stoppage in steel production at midnight, April 8, 1952. The stoppage on April 8 is the stoppage which, the companies assert, should have been prevented by the President by use of the Taft-Hartley procedures. The stoppage on April 8 is the emergency which, the companies argue, existed only because of the President's failure to invoke the Taft-Hartley procedures.

This entire argument ignores the fact that the kind of crisis which the Taft-Hartley Act was designed to deal with first arose not in April, 1952, but in December, 1951. By forgetting the December crisis and focussing the inquiry solely on what happened in April *after* the President's action in December, the companies ask a false question—and get a false answer.

The Situation in December, 1951.—The situation in December 1951 was this: The Union's contracts with the employers in the industry were to expire on December 31. During the prior negotiations, the Union had made, as stated in affidavits filed in this case (R. 59), more than a hundred proposals for changes to be included in new contracts. No substantial concessions on any of these proposals had been made by the companies. The services of the Mediation and Conciliation Serv-

ice provided for under the Taft-Hartley Act had been invoked and had failed. A strike was about to occur. It was a strike which would affect an entire industry and would, presumably, imperil the national health or safety.

Under Sections 206-210 (29 U.S.C. §§ 176-180) of the Taft-Hartley Act, the President is given authority in such situations to appoint a board of inquiry to investigate the facts with respect to such a dispute. After such a board is appointed and reports to the President, the President is authorized to direct the Attorney General to seek an injunction against the strike. This injunction lasts for 80 days. At the termination of this 80-day period, the Act requires that the injunction be discharged, and the parties are free to engage in whatever action—including a resumption of the strike—they believe appropriate.

The 80-day injunction provided for under Taft-Hartley is supposed to be a "cooling off" injunction. It is an extra 80-day period of delay added on to the normal period for resolution of labor contract disputes. Under Section 8(d)(1) of the Act, the parties are required to give 60 days notice of any proposed termination or modification of a collective bargaining contract. 29 U.S.C. 158(d)(1). If the dispute is not settled within 30 days, additional notices to the Federal Mediation and Conciliation Service are required by Section 8(d)(3), so that the Service may intervene to aid in a settlement prior to the expiration of the contract. If agreement is not reached by the contract termination date, a strike will ordinarily occur. Only in the special "emergency" cases covered by Sections 206-210 is there any additional delay. In such cases, an injunction can be obtained which will add another 80 days for negotiation after the expiration of the contract, in the hope that the parties can, in that period, resolve their differences.

This procedure was presumably available to the President, to deal with the impending shutdown of steel production on December 31, 1951. If the President had invoked it, the strike would have been delayed for a period of 80 days. A board of inquiry would have reported upon the facts of the dispute and the contentions of the parties. Finally, if the dispute were not settled during the period of injunction the President

would have been required to submit to the Congress a report of what had taken place with whatever recommendations as to action which he might see fit to make.

But this was not the only procedure available. The President, by executive order, had the power to set up still other procedures to handle disputes of this nature. And the President had in fact established such procedures. The reason for their establishment is probably best suggested in the Second Annual Report of the Federal Mediation and Conciliation Service, issued December 31, 1949, in which the following is stated, not with reference to a period of national emergency, because none existed at that time, but with respect to strikes of great magnitude during normal times:

> ". . . although the national emergency provisions of the Labor Management Relations Act, 1947, give assurance of 80 days of work and production, they do not provide procedures which give sound and substantial promise of inducing settlement during the period of the injunction. During that period there is little or no incentive to bring the dispute to a conclusion. The prevailing tendency is to await the discharge of the injunction at which time the parties are free to employ their economic weapons of strike or lock-out.
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> "It would seem that the continuance of work and production for 80 days or any other period might be assured in some national emergency disputes without the necessity of resorting to the injunctive process or other methods of compulsion. There are available for use procedures which go beyond mediation, as discussed here, and fall short of the compulsion inherent in injunction decrees and seizure orders. Most unions and employers, unable to arrive at agreement through collective bargaining before a deadline date, particularly where a stoppage will have serious national consequences, may well be willing to defer the use of economic force until a respected impartial board, to be appointed either by the President or the Director of the Federal Mediation and Conciliation Service, has an opportunity to hear the parties and make recommendations for a fair settlement. Unions and employers negotiate through representatives who are not always in full control or mastery of the situations in which they find themselves. Sometimes they are the prisoners or victims of their own tactics and strategy. Recommenda-

tions by a disinterested body which sharpen and narrow the issues and suggest fair and equitable terms of settlement of a dispute which appears to the parties to be insoluble on the deadline date may provide them with a happy solution to an impasse. Face-saving and prestige is at least as important in industrial disputes as it is in other types of disputes. The recommendations of such a board, although not binding on the parties, can be expected to have the force of public opinion behind them to encourage compromise and settlement. The public, although not technically a disputant at the bargaining table, is a party in interest in a real and important sense. . . .

"These observations should not be taken as constituting a proposal that the Chief Executive refrain from acting under the national emergency provisions of the Act on occasions when the protection of the national safety or health require that he do so. I am suggesting, however, the use of voluntary procedures which seem to be well designed to encourage settlement and which, although they may be regarded as going beyond normal mediation techniques, fall far short of the compulsion associated with the injunction decrees and seizure orders. I am aware of no statutory bar to officials of the Federal Government proposing such procedures for the voluntary settlement of a labor dispute. Such procedures, of course, could only be effective where there is a prior assurance that the employer and the union will cooperate by maintaining the status quo for a sufficient period of time to enable the board to conduct its hearings, hand down its recommendations, and afford the Federal Mediation and Conciliation Service an adequate opportunity, thereafter, to bring the parties to agreement on the basis of the recommendations. As indicated above, moreover, those procedures should be used only in cases of the greatest magnitude and importance to the national interest. Their employment in lesser cases would be destructive of collective bargaining in that the parties might be encouraged to pass off their responsibilities to a board. I do not suggest, of course, that this procedure be used in every important dispute that may occur. Its employment depends on the facts of the case. There is no single formula for handling all labor-management disputes." 2d Annual Report, Federal Mediation and Conciliation Service (1949) pp. 7-8.

Acting in accordance with the suggestion contained in this report, and upon the recommendation of the President's Ad-

visory Committee on Mobilization Policy, the President had established, by Executive Order 10233 (16 Fed. Reg. 3503), a disputes procedure which could be used with respect to disputes seriously affecting the progress of the national defense.[1]

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[1] The scope of the WSB procedures is considerably different from that of the Taft-Hartley provisions. But in a case such as the steel dispute either was applicable.

The relationship between the two is clearly set forth in the following testimony of Dr. George Taylor, the then Chairman of the Wage Stabilization Board, before the House Committee on Banking and Currency in connection with the 1951 amendments to the Defense Production Act:

"MR. TAYLOR. . . . The Taft-Hartley procedure is something quite different from the Board's.

"It gives the President discretion to deal in a particular way with certain special labor disputes. Before the President can invoke these powers, there has to be a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, or the production of goods for commerce. This strike or lock-out, actual or threatened, must be one which Would imperil the national health or safety if permitted to continue or to occur. Only under these circumstances will the President invoke these procedures. If these conditions are met he may appoint a Board of Inquiry with compulsory powers to inquire into disputes, find the facts, and report their findings to him.

"The Wage Stabilization Board machinery, on the other hand, is to be used whenever the President believes a labor dispute 'substantially threatens the progress of the national defense effort.' Circumstances dictate procedures, and the circumstances and the interest threatened calling for the use of one procedure or the other are entirely different. In any event, nothing in our procedures impairs the President's power of discretion to resort to the Labor-Management Relations Act. From an industrial relations viewpoint, it is clear that the two procedures are essentially separate and distinct from beginning to end.

"During this period, when we are preparing for our national defense, we must use all the tools of achieving agreement at our command. These techniques include collective bargaining, and the negotiations that go with it, conciliation and mediation, the national emergencies procedures of the Labor-Management Relations Act, and the new machinery which I have just described.

"The question has been asked as to what the Board would do if a dispute involving a stoppage of production were referred to it by the President. While I can speak only for myself, I wish to make very clear what my position would be in that situation. I would recommend to the Board:

"First, that it do everything in its power to obtain an immediate resumption of production. Second, that the Board take no action concerning the merits of the dispute until that end was attained.

"Thus to meet the problem raised by a new kind of labor dispute —disputes affecting the defense effort—a new kind of machinery, closely geared to the defense effort and preserving voluntarism to a maximum degree, has been established. As such, it provides labor, management, and ultimately the public with a widened choice of technique, a new instrument, for the settlement of labor disputes in a mobilization period." (Hearings before the Commit-

This was a voluntary procedure. It required, first, that the President certify the dispute to the Wage Stabilization Board as one which "substantially threatens the progress of national defense." Secondly, under the Board's own rules, it required that the Union voluntarily agree to postpone or call off its strike for the period of the Board's deliberations and that both parties voluntarily agree to present their sides of the dispute to the Board.[3] If those conditions obtained, the Board would take the case and, after consideration of the merits of the dispute, would make recommendations as to fair and equitable

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tee on Banking and Currency, House of Representatives (82d Cong., 1st Sess.) on H. R. 3871, p. 306).

"MR. TAYLOR. . . . I think the Taft-Hartley procedures are usable by the President within his discretion just as always.

"MR. COLE. I understand they are usable, I understand they are usable. The question is, Will they be used? In that connection, you say that this is not inconsistent with the Taft-Hartley procedure?

"MR. TAYLOR. I don't believe it is.

"MR. COLE. Let's assume that it is not inconsistent, but is it your judgment that even though it were not inconsistent, it might still be a different and new and completely unusual procedure, which might supersede the Taft-Hartley law?

"MR. TAYLOR. As I understand the Taft-Hartley procedure, the President is given the discretion, where there is an industry-wide problem, or one affecting substantially a part of an industry to take certain steps. As I understand it, it is discretionary.

"I think you can have another type of dispute, which typically grows out of the needs of a defense program, a dispute which substantially interferes with the production program, or words to that effect. It is an entirely different kind of labor dispute which is referred to.

"Your question as to whether there is overlapping, it seems to me, that there are two separate tools in a defense program which is new, new kinds of problems, you have a new tool which can be used for a new kind of situation. I think it is discretionary in both cases. How the President will utilize them, I, of course, wouldn't say. It is within his discretion." (*Id.*, at pp. 312-313.)

[3] In the present dispute in the oil industry, the President certified the dispute to the Board on March 6, 1952. The unions involved agreed to submit the dispute to the Board. Some of the companies, however, refused to participate in the Board proceedings. 29 Labor Relations Reporter 284. Hence the Board returned the case to the parties on April 16, 1952 (29 Labor Relations Reporter 296), and a strike ensued.

In another case, covering a large portion of the country's copper mining industry, the Mine, Mill and Smelter Workers refused to call off their strike. In accordance with its policy, the Board refused to hear the case and the President invoked the injunctive provisions of the Taft-Hartley Act.

It should be noted that in the steel case, unlike the copper and oil cases, both the Union and the companies agreed to submit their sides of the dispute to the Board and cooperated fully in the Board proceedings.

terms of settlement consistent with the Government's wage stabilization policies.

The power of the President to establish such an alternative procedure was never seriously questioned in the Congress. Indeed, subsequent to the establishment of the WSB dispute procedures, a bill was introduced in the House which would have prohibited any governmental agency from dealing with labor disputes except as specified in Congressional enactments. It specifically removed from the Wage Stabilization Board the disputes procedures which the President had established. The bill (H. R. 4552, 82nd Cong., 1st Sess.) was offered as one of the proposed 1951 amendments to the Defense Production Act of 1950. It was fully debated on the House floor and resoundingly defeated. 97 Cong. Rec. (daily ed.) 8606. A similar amendment was introduced in the Senate by Senator Taft (97 Cong. Rec. (daily ed.) 7592) but was withdrawn in view of the House action. It is clear that Congress was fully aware of the alternative procedures established by the President and, in the face of this knowledge, defeated an attempt specifically to deny to him the use of such alternatives.

The situation in December, 1951, then, was this: The President presumably could have invoked the "cooling off" provisions of the Taft-Hartley Act. If he had done so a court of equity would have been empowered to issue an 80-day injunction against the impending strike. A board of inquiry would have been appointed, with authority to investigate the facts but without the power to make recommendations. If the 80-day "cooling off" period failed to produce a settlement there was no terminal facility. On the other hand, the dispute procedures of the Wage Stabilization Board were available. Under these procedures there would not be an injunction. However, under the rules of the Wage Stabilization Board the parties would have to agree voluntarily to preserve the status quo and put off the strike while the Board investigated the dispute. The Board would be empowered to investigate the facts, but unlike the Taft-Hartley board, it would have power to make recommendations. Finally, if these recommendations did not result in settlement there would be, as in the case of the Taft-Hartley Act, no terminal facilities.

Events of December 22, 1951-April 8, 1952.—The President had a choice in December 1951. He presumably could have obtained an injunction against the strike under the Taft-Hartley Act, or he could ask the Union to enjoin itself and submit the case to the Wage Stabilization Board. If the President had, at that date, ignored both procedures and seized the industry, the argument which the companies now make might be apposite. But he did not. For reasons which must be obvious from the report of the Mediation and Conciliation Service quoted above the President chose the WSB alternative. It has never been suggested by anyone in this litigation that in making this choice between alternative remedies the President violated any statutory or constitutional restrictions.

What happened? The first question was whether the Union would voluntarily agree to postpone its strike. We want the Court to understand that this was a serious question to the Union. If we refused, the President might use the Taft-Hartley Act. If he did, we might be restrained from striking for 80 days. But at the end of that period we would be free of all Government restraint. We would thus avoid the risk of having our demands subjected to compromise by a board empowered to make recommendations. We could look forward, at the end of the 80-day period, to the use of our full economic power in support of *all* of our original demands. From the viewpoint of the Union's selfish interest there was much to recommend this course of action.

On the other hand, the President had asked us on behalf of the country to submit our dispute to the Wage Stabilization Board. The loss of steel production which would necessarily be involved in any strike which we might undertake at the end of the Taft-Hartley period might be avoided if a solution to the dispute could be achieved on the basis of recommendations made by the Wage Stabilization Board.

We have no hesitation in telling this Court that the issue thus posed to the Union was a difficult one to resolve. If we would refuse we would retain our maximum bargaining position. But on the other hand to refuse would be to ignore the request of the President of the United States and the needs of the defense program.

The Union made its choice. The President had certified the case to the Board on December 22. 1951. After five days of deliberation the Union, on December 27, determined to defer its strike until January 3, 1952, at which time the matter could be further considered by a Special International Convention which had been called for that date. The Union's Special Convention, composed of 2,500 delegates from all over the country, determined, after two days of debate, to comply with the President's request and to postpone the strike while the case was being considered by the Wage Stabilization Board. And so, on January 4, 1952, the strike was postponed.

The case went to the Wage Stabilization Board. The Board conducted lengthy hearings in January and February, 1952. The Union, which had originally postponed its strike only until February 24, 1952, was faced with the necessity of further deferring its action at that time since the Board had not completed its consideration of the case. On February 21, 1952, the Union again deferred its strike to March 23, 1952. On March 20, 1952, the Wage Stabilization Board issued its report and recommendations for the settlement of the dispute. There was not time to conduct negotiations on the basis of those recommendations before March 23, 1952. So again, in response to a request from the Chairman of the Wage Stabilization Board, the Union deferred its strike, setting a deadline of April 8, 1952.

The net effect of all these postponements was that, at the request of the Government, the Union had voluntarily enjoined itself from striking for a period of 99 days, a period well in excess of the 80-day "cooling off" period which would have been provided if the President had invoked the Taft-Hartley procedures rather than the Wage Stabilization Board procedures in December. Every objective of the Taft-Hartley Act had been fulfilled. There had been a cooling off period —indeed a longer cooling off period than is provided for under the Taft-Hartley law. There had been an investigation into the dispute by a Board—indeed, the Board, through its recommendations, had done more than was possible under the Taft-Hartley law to provide a basis for settlement of the dis-

pute. At this point, the procedures that were invoked having failed to produce a settlement, the Union had no alternative but to strike.

Conclusion.—In view of this background it is the veriest nonsense to state that the President was obliged to invoke the procedures of the Taft-Hartley law on April 8. The situation which the Taft-Hartley law was designed to meet—the breakdown of negotiations at the end of the statutorily required period for negotiations—had already occurred and had already been met in a way which went beyond the remedies available under Taft-Hartley. It is ridiculous to suggest that, this procedure having been followed through to the end, the Union should have been required to start all over again under the Taft-Hartley law, with a new board of inquiry again investigating the merits of a dispute which had already been thoroughly investigated over a three month period by the Wage Stabilization Board. The stultifying nature of any such action —to borrow a word from Judge Pine—was exposed by the suggestion, made by counsel for Bethlehem Steel in oral argument both before the District Court and the Court of Appeals, that the President could have avoided the delays in the Taft-Hartley procedure by appointing the Wage Stabilization Board itself as the board of inquiry under the Taft-Hartley law.

We do not contend, be it noted, that in no case would the President have power to invoke the Taft-Hartley emergency procedures after the WSB procedures have been exhausted. We do contend, however, that under the circumstances here present, where the principle objectives of the Taft-Hartley procedures had already been accomplished, the President's refusal to start the merry-go-round again was fully justified. Indeed, we believe that the court of equity to which any request for an injunction would have been addressed, in the exercise of the discretionary powers which are given to it under the Act, would have refused to issue an injunction for these very same reasons.

One more point should be noted. Until the steel dispute arose, the Wage Stabilization Board has been quite successful in averting or stopping interruptions of production in industries

vital to the national defense. Except in one case[8] the unions involved in disputes certified by the President to the Wage Stabilization Board had voluntarily postponed or called off their strikes and in each case, prior to the steel case, the Board's recommendations had provided a basis upon which the parties were able to settle their dispute without any interference in production for national defense.

These results were achieved because both labor and industry generally recognized the usefulness of the WSB procedures. In particular, the unions who were asked to postpone their strikes did so in the national interest because they recognized that they would not be required utterly to surrender the rights of their membership in so doing.

All of this might have been destroyed in a single stroke if the President had used the Taft-Hartley procedures against the union *after* the Union had voluntarily submitted to the Wage Stabilization Board procedures and agreed to accept its recommendations. No union, conscious of its responsibilities to its membership, would thereafter consent to voluntary submission to the Wage Stabilization Board. If the Taft-Hartley delay was to be imposed in any event there would be no reason for a union first to subject itself voluntarily to the greater delay involved in Wage Board consideration of the case. Furthermore, it may reasonably be assumed that no self-respecting labor organization would consent to serve upon a tripartite Wage Stabilization Board under such circumstances.

The course of action proposed by the companies as an alternative to the action which the President took on April 8, therefore, would have involved an immediate danger that the government's entire tripartite Wage Stabilization Board machinery would collapse. It is easy simply to say that the President should have invoked Taft-Hartley on April 8, 1952. We submit that it is somewhat harder to say that the President had a constitutional duty to destroy a major portion of the government's stabilization machinery in order so to do.

For all of these reasons, we believe that, irrespective of what may have been the powers of the President with respect

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[8] The copper case referred to *supra*, n. 2.

to seizure on April 8, 1952, those powers cannot be considered as limited or diminished by virtue of the fact that he did not invoke the discretionary injunctive provisions of the Taft-Hartley Act against the Union at that time.

II

The steel dispute giving rise to the emergency of April 8, 1952, was a price dispute between the government and the industry.

In the memoranda submitted by the parties in the District Court, issue was joined as to whether the Presidential action of April 8, 1952 was "to settle a labor dispute," as contended by the companies, or "to insure the uninterrupted production of steel," as contended by the Government. We think that the two come to the same thing if it is necessary to settle a labor dispute in order to insure the uninterrupted production of steel. But the issue as posed is misleading. It assumes that the dispute here was between management and labor, with the Government interested in its settlement only because of the nation's need for steel.

This is not the case. As one of the parties to the labor dispute we know that it could have been settled long before April 8, 1952, were it not for the existence of an underlying dispute between the steel companies and the Government as to the price of steel. This is now a matter of public record. On April 16, 1952, in testimony before the Banking and Currency Committee of the House of Representatives, which was referred to in an affidavit filed in this case (R. 73), the following colloquy took place between Senator Pastore of Rhode Island and the Director of the Office of Price Stabilization:

> "MR. ARNALL. . . . So, as far as I know, this is the first crowd that came in and said, 'We want a price increase. We demand a price increase.'
>
> "SENATOR PASTORE. As a matter of procedure, do you mean to tell me that collective bargaining negotiations of the CIO hinged upon what your agency would have done in allowing them to raise the prices first?
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> "MR. ARNALL. Senator Pastore, I regret to say it, I am embarrassed to say this, but the truth of it is that

the entire wage negotiations have been based upon what we do in price increases for steel. The reason those negotiations have broken down is because we will not agree to a commensurate price increase to offset the labor cost." (Transcript of Hearing on S. 2999 (82d Cong., 2d Sess.) Senate Committee on Labor and Public Welfare, pp. 150-151.)

The merits of the various contentions of the parties to the wage dispute between the companies and the Union, and of the price dispute between the companies and the Government, may not be relevant to the resolution of the issues before this Court. The fact that the price dispute between the Government and the industry was the basic cause of the impending shutdown of steel production on April 8, 1952, is, perhaps, relevant.

Let us suppose that the facts in this case were that there was no wage dispute, that the steel companies had simply asked the Government to revise its price regulations so as to raise the ceiling set for steel under the Defense Production Act of 1950, as amended. Suppose that the Government's price stabilization agency had refused to comply with this request to alter its regulations and, as a result, the companies threatened to halt the production of steel. Suppose that the President of the United States, in response to this threat, took seizure action by Executive Order and the companies sought to enjoin this action.

That is, in substance, the posture of the present case. It is true that the industry did not directly threaten the government with a shutdown of steel production. It did not have to. By withholding its consent to the compromise recommendations of the Wage Stabilization Board it could create a situation in which the Union would be forced to strike and, thus, accomplish the same result.

It is no answer to say that the Union could have refrained from striking. Its members had suffered a cut in real wages amounting to about 16 cents per hour since the last negotiated settlement with the steel industry. Simply to acquiesce in the maintenance of the *status quo*, as proposed by the companies, would have meant self-destruction for the Union.

The situation, then, was this. The companies would settle

with the Union. But they would only do so if the government amended its price regulations in favor of the steel companies. If the government refused, a strike would occur and the production of steel would stop.

This was clearly brought forth at hearings held by the House Committee on Banking and Currency on May 2, 1952, at which Mr. Arnall, Mr. Putnam, Administrator of the Economic Stabilization Agency, and Mr. Bullen, Vice Chairman of the Wage Stabilization Board, testified together. At that hearing, the following colloquy took place:

"MR. BOLLING. They [the steel companies] are not in principle opposed to the wage increase as you see the situation?

"MR. ARNALL. They are not in principle opposed in any way to the wage increase, and have so told me.

"MR. PUTNAM. I think, to put it another way, if I may, Congressman Bolling, I think the issue here is whether they get special and different treatment from every other industry or whether they abide by the same rules that all other industries abide by. I think that is the issue."

. . . .

"MR. BOLLING. Would it be too strong a statement to make to say that the steel companies in this situation are in effect using their economic power, as the producers of a basic element in our domestic and defense economies, to bargain, not with the steelworkers' union, but with the people of the United States, to obtain a concession which is not otherwise justified?

"MR. ARNALL. In my judgment, they have no issue with the Union. They are making a lot of talk about it. But their issue is with the Government. They figure they have got the Government across a barrel, and they are going to extort this price increase, or wreck the economy. Let me make it that simple."

. . . .

"MR. WOLCOTT. Are you going to let that statement rest on the record, that the steel industry wants to wreck the economy?

"MR. ARNALL. No, it is a threat they make. Unless

these price increases are granted, the economy will be wrecked, because they won't produce steel." (Transcript of Hearing, Vol. III, pp. 401-404.)

All of the alleged negotiations between the companies and the Union were a sham.[4] Time and again in our conferences with companies in the industry we were told that settlement with the Union would depend on the outcome of other negotiations going on elsewhere. Those negotiations, the real negotiations, took place between the companies and the government on the price issue. As a direct result of the Government's refusal to give in to the companies in those negotiations the industry would have shut down at midnight on April 8, 1952.

We recognize that, in the present state of the record, it may be impossible for the Court to make any finding as to the basic cause of the emergency with which the country was faced on the night of April 8, 1952. We think, however, that material of which the Court can take judicial notice makes it clear that there is at least a reasonable question as to whether the basic controversy was a labor controversy between this Union and the plaintiff companies, or a controversy over price regulations between the government and the industry. Therefore, we submit, at the very least, the Court should not decide the basic constitutional questions here involved on the assumption, made but not proved by the companies, that the purpose of the Executive Order 10340 was "to settle a labor dispute."

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[4] It is the Union's firm conviction that the companies deliberately avoided making any offers which might have produced an agreement with the Union in order that they might generate a crisis which would force the Government's hand on prices. Thus, during the negotiations with the Union in November and December, 1951, the companies did not offer a single cent in wages or fringe benefits even though it was obvious that under even the most strict and anti-labor interpretation of the Wage Board's regulations the Union was entitled to some wage increase. Any litigant can be expected to offer to settle before adjudication on the terms which would result if he prevailed in the litigation. But the steel companies refused to offer anything prior to submission to the Wage Board—not even the amount eventually proposed by the industry representatives on the Board.

The reason, the Union believes, is plain. If a satisfactory offer were made, it might be accepted. If it were accepted, there would be an agreement. And if there were agreement there would be no crisis and no way in which the industry could apply pressure on the Government for a change in the price regulations applicable to steel.

III

The court should, with the greatest expedition possible under the circumstances, dispose of the case in such a way as to avoid any continuation of the status now obtaining.

As a result of the terms of the stay issued by this Court on May 3, 1952, the following situation prevails: The Secretary of Commerce, acting in the name of the United States, is in nominal possession of the steel-producing properties of the plaintiff companies. He is forbidden, however, to make any changes in the terms and conditions of employment prevailing at those properties without the consent of the companies. The heads of the companies are continuing to operate them precisely as they did before. The processes of procurement, production and sales are not being interfered with in the slightest. And the profits resulting from these operations continue to accrue to the private owners.

There is only one significant change from the situation prevailing prior to the seizure. That change is a drastic alteration, for the time being, of the balance of power in the collective bargaining relationship. Collective bargaining can have substance only if the possibility exists that the Union can use its economic strength in support of its proposed changes in the terms and conditions of employment. This does not mean that collective bargaining necessarily entails strikes. It does mean that, without the possibility of a strike, the Union has no bargaining power and, hence, there is no incentive for the companies to bargain.[5]

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[5] "In genuine collective bargaining . . . the possibility of a strike or lockout is . . . an ever-present and controlling factor in the realistic processes of collective bargaining. Those processes lose all of reality if the workers have not the right to reject management's offer and quit, or if management has not the right to refuse the workers' terms and close the plant. It is the overhanging pressure of this right to strike or to lockout that keeps the parties at the bargaining table and fixes the boundaries of stubbornness in the bargaining conferences . . . Unless the negotiating parties are faced with this possibility of a strike or a lockout, and are forced to examine and accept the consequences of their own decision, they are free from the responsibility that makes genuine collective bargaining possible and produces through it creative results. Thus, for the ordinary labor dispute, the possibility of a strike or lockout is, in the last analysis, the most potent instrument of persuasion."—*Strikes and Democratic Government*, Twentieth Century Fund (1947), pp. 12-13.

To the extent that the possibility of use of the strike weapon is lessened in periods of national emergency such as the present, collective bargaining can be expected to succeed only if there is some substitute for the diminished threat of economic conflict. The procedures of the Wage Stabilization Board established by the President, as well, presumably, as the Board of Inquiry provided for under the Taft-Hartley Act, were designed to introduce into the collective bargaining picture the power of public opinion as an inducement to settlement of emergency disputes. When the pressure of public opinion is unsuccessful, as it has been in this case, then other forms of inducement must be resorted to. In the absence of any pressures for a settlement it may safely be assumed that no settlement will be reached.

It is for this reason that we urged the Court, in our brief *amicus curiae* with respect to the terms of the stay, not to condition that stay upon the maintenance of the terms and conditions of employment now in effect at the plants of the plaintiff companies. We said that, by so doing, the Court would deprive us of an employer with which we could deal and that so to do would be manifestly unfair. The companies responded to this suggestion by stating that the Union always could deal with the companies and that, under the terms of the Executive Order here involved, precisely this kind of bargaining was anticipated. Apparently this argument prevailed.

That issue having been decided against us, we do not intend to re-argue it here. But we should make it clear that the effect of that decision has been to preserve the Union's right to bargain in form but to render it meaningless so long as the case is pending in this Court.

We said above that the possibility of a strike gave meaning to the process of collective bargaining. Just so, in the present situation only the possibility that the Government would make changes in terms and conditions of employment gave substance to the collective bargaining discussions of the parties to the dispute. This does not mean that the Union would welcome any change in wages or working conditions imposed by the Government, any more than the Union welcomes a strike. The Union does not want this dispute to be resolved by

dictation from the Government. But only when the possibility of Government action existed was there any reasonable probability that the dispute could be settled by bargaining between the parties.

This was shown most dramatically in the collective bargaining conferences which the President convened at the White House on May 3, 1952. It has already been stated accurately in the press that in those sessions, for the first time since this dispute began, there were indications that a negotiated settlement might be reached. In convening the conferences, the President addressed the participants in no uncertain language. He said flatly that unless an agreement were reached the Government would immediately undertake to make unilateral changes in the terms and conditions of employment. He added that the proposed action would not be satisfactory to either party.* Upon this premise, the companies both proceeded to bargain with the Union in a way which gave genuine promise that a solution would be achieved.

The announcement of the Court's stay order on the afternoon of May 3, abruptly changed the course of negotiations. Where there had been promise of a settlement before that announcement, there now was none. The conferences finally terminated on Sunday, May 4th, with no agreement having been concluded. We do not think that we had legally lost the right to strike.† But as a Union conscious of our responsibilities and our position in the nation, we did not engage ourselves in a strike against the Government of the United States.

The Court undoubtedly acted as it did in the light of the well-established judicial procedure of maintaining the status quo in all particulars pending the termination of a

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*A copy of the President's statement of May 3 is printed in Appendix A to this brief for the convenience of the Court.

†*United States* vs. *United Mine Workers*, 330 U. S. 258, often cited in this connection, holds only that the Norris-LaGuardia Act is inapplicable as a jurisdictional bar to injunction proceedings during periods when the Government stands in the position of employer. It does not hold that government seizure alone creates a cause of action against a strike which is otherwise lawful. The strike involved in the Mine Workers case was presumed unlawful because, in violation of a contract. There is in this case no contract and, so far as we are aware, no basis upon which to argue that a strike against the employer would be unlawful.

litigation. But we think these facts underline the urgent need that the Court terminate the present status as quickly as possible. So long as that status continues, there is in fact no possibility that the steel dispute can be settled by negotiation. Once the status is changed, by decision either in favor of the Government or in favor of the plaintiff companies, the forces which tend to induce agreement by the parties will again be free to operate and it is our earnest hope that those forces will induce agreement.

We want to emphasize the fact that the Union wants a negotiated, not a dictated, agreement. That has been our position from the beginning. The companies have told the Court in their affidavits on record in this case that there are hundreds of issues involved in this dispute. These issues involve such matters as seniority, hours of work, safety, grievance procedure, the details of the arbitration machinery, and others. With respect to almost all of these issues, as well as the wage items, it is the Union which desired to change the pre-existing collective bargaining contract and it was the companies which desired to retain the status quo. Most of these issues were returned by the Wage Stabilization Board to the parties for negotiation without recommendation.* With respect to these issues, therefore, it is clear to the Union that no settlement imposed by the Government can be satisfactory. And these issues, although not involving major monetary considerations, are of great importance to the Union and its membership. For this reason, as well as for the reason that the Union profoundly prefers a negotiated settlement to an imposed one, the Union does not look forward to governmentally imposed changes in wages and working conditions. But in the absence of any power in the Government to make such changes there is not the slightest incentive for the companies to reach agreement with us.

The position of the companies in this dispute from the beginning has been that the status quo should be maintained. Every day in which it is so maintained represents the possibility of

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*With respect to the only major contractual issue on which both the Union and management sought changes from the *status quo*—management rights—the Board recommended that no changes be made.

net gain to them. It is not merely for them a question of putting off the day of settlement. Although the Board has recommended retroactivity as to wages, we have as yet no agreement on that subject. Our members are still working at 1950 wages and paying 1952 prices. Each day in which this situation continues may thus represent a substantial net gain for the companies. The urgency in the present situation, therefore, is not simply a desire to know at the earliest possible time how the controversy will terminate. It may well represent a substantial difference in the living standards of our members.

Under these circumstances, we urge the Court most respectfully to dispose of the present litigation with the utmost speed. We recognize, of course, that serious and important constitutional questions are here presented. The opinion of the Court in this litigation may constitute a landmark in the history of American jurisprudence. We therefore should not be understood as urging the Court to deal cavalierly or with undue haste with these serious issues in order to serve the needs of the moment. We urge the Court, rather, to adopt a device frequently used in the Court's history and most recently used in the case of *Ray* v. *Blair*, No. 649 this Term, that is, to announce its decision and enter its judgment as promptly as is reasonable under the circumstances after argument has been concluded, reserving for later filing the opinion or opinions of the members of the Court. If this device be adopted, the present unhealthy and unfair situation can speedily be terminated without sacrifice of the necessity for careful consideration of the Court's opinion on the constitutional issues involved. If this suggestion does not meet with the Court's approval and if the Court feels that the grave nature of the issues requires extended deliberation before any decision is announced, we then respectfully urge the Court to modify the terms of its stay upon the conclusion of oral argument herein.

Some injustice may be the price which has to be paid for orderly adjudication of important constitutional issues. We think it is a little unfair that the price should be paid entirely by the steelworkers of America. It is being so paid so long

as the present status continues. Hence, with all due respect, we urge the Court to take whatever action it deems appropriate at the earliest possible time.

Respectfully submitted,

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APPENDIX A

STATEMENT BY THE PRESIDENT TO THE REPRESENTATIVES OF THE STEEL COMPANIES AND THE STEELWORKERS UNION, SATURDAY, MAY 3, 1952.

I have asked you to meet here today to reach agreement on the issues in dispute between you.

As President of the United States, representing all the people of the country, I have two principal interests in this matter.

First, it is absolutely necessary, for the safety of the country, that steel production must continue during the emergency.

I cannot reveal, even to you people here, the exact situation with regard to the supply and production of military items. I can only say, on the considered advice of the officials in charge of our defense program, that the safety of our troops fighting in Korea, and the safety of our nation in the present world crisis, depend on the uninterrupted production of steel.

Second, it is essential to the economic health of our country and the welfare of our people that wage and price increases in the steel industry shall be held within the limits of sound stabilization policies.

A runaway inflation in this country could wreck our economy and impose terrific hardship on millions of families.

These are heavy stakes. And they impose an equally heavy responsibility on everyone of you to act in the national interest.

Because of the vital importance of uninterrupted production of steel, I was forced three weeks ago to direct the Secretary of Commerce to operate the mills. That action is now being challenged in the courts, as is entirely proper. None of us know how soon it will be decided.

In the meantime, the mills are under Government operation.

I have said many times that the idea of Government operation of the steel plants is thoroughly distasteful to me. I have had to operate the coal mines one time and I didn't like that

either. I want it ended as quickly as possible. The best, the quickest, and the most equitable way for this to be done is for the companies and the Union to bargain out the issues in dispute and agree on a settlement.

That is what I am asking you to do now. And I am asking you, as the head of the greatest government in the world, to get down on earth and talk to each other without any ill feeling, and to get this thing done.

I am sure you are aware that the Government has been considering what are fair and reasonable wages and working conditions for the employees during the period that the plants remain under Government operation.

Two weeks ago, the Secretary of Commerce asked the Economic Stabilization Administrator to prepare recommendations for changes in terms and conditions of employment in the steel industry at this time. Those recommendations have now been completed, and the Government will be prepared on Monday morning, or as soon as we can get ready, to order changes in terms and conditions of employment to be put into effect.

I do not want the Government to have to fix terms and conditions of employment. That is your job, not ours. If we must take action it will be something that is not satisfactory to either side. But we will have no choice if you cannot agree.

I consider it extremely unfortunate that the Government may find itself in a position where it has to fix the terms and conditions of employment in an industry.

However, the purpose of these meetings is not to discuss terms and conditions of employment during Government operation. The purpose is to try to reach an agreement between the parties so that Government operation can be brought to an end.

In these meetings, you have the opportunity to settle this dispute as it should be settled. You can reach agreement if you have the will to do so.

You have all been over the issues between you many times.

Days and weeks have already been spent in negotiations. You know which points are the crucial ones. You know this matter *can* be settled in a few hours.

In the interest of your country, for the welfare of the United States, and for the welfare of the world, I am asking you to make that settlement.

We all know that a big issue in this whole controversy is the steel companies' claim for higher prices as a result of any wage increase that might be agreed upon. As I have said on a number of occasions, there is only one proper way to settle this entire controversy. First, the parties should reach agreement on the issues in dispute between them. Then, the companies should present their claims for price increases to the proper Government officials.

On their part, the stabilization officials of the Government are prepared to consider the steel comp[illegible] claims on their merits, and to make sure that the s[illegible]npanies receive whatever price adjustment they are entitled to under the law.

Gentlemen, the eyes of the nation are upon you as you meet here in the White House today. You represent two powerful economic groups who have contributed immeasurably to the greatness of our country. You have great power; and, because of that fact, you all have great responsibility. You have achieved your strength in a democracy which places its faith in the ability of its people to work out their own problems as reasonable men in the national interest. I urge you to reaffirm that faith by settling your differences now in this time of critical national need.

This room—the President's Cabinet Room—is yours for these meetings. Some great decisions affecting the welfare of our country have been made in this room. Your agreement on a settlement of this dispute would rank with any of them as a contribution to the common defense and the general welfare of our nation.

I am asking John Steelman to sit with you, to help you in trying to reach an agreement, and to keep me constantly advised of your progress.

Now gentlemen, I have never felt as strongly about anything as I do about this situation. We have a national defense program which is right on the verge of success.

For seven years, from April 12, 1945, until now, I have spent my whole time trying to keep this country out of a third world war.

If we can get the economic situation and the defense situation in Western Europe through to a successful conclusion, and that depends on steel, if we can get the situation in the Far East settled on a basis that is fair to all concerned, I am just as sure as I sit here that we'll get a world peace. And with the development of the world after that world peace, there won't be a chance for our industry to catch up with the demand.

Then that means the welfare of labor; it means the welfare of industry. I don't think any of you can complain about the situation of the economy at the present time. There's been a fair distribution of profits; there's been a fair distribution of earnings; there's been a fair distribution of the farm income. All of you are more prosperous than you have ever been in the history of this country.

Never in the history of the world has there been an economic situation that equals it, and you gentlemen can't afford to upset that situation over a private quarrel between labor and industry.

I want you to forget all your emotions now and sit here and see what you can do.

Mr. Sawyer has been the operator under the present circumstances, and he's been fair and decent in this matter. We are going to continue to be fair and decent to you.

I didn't send for you just to make a speech. I sent for you for action and, gentlemen, I want it.